Office-Supreme Court, U.S.
FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

—v.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The American Civil Liberties Union and its affiliate, the New York Civil Liberties Union, which file this brief with consent of the parties,* have consistently supported the provision of the First Amendment which forbids the establishment of religion. The Union has appeared in many cases, in this Court and others, to present its view of the Establishment Clause. We do so again in this case, in support of appellant, because we believe that the New York laws involved here which grant tax exemption to churches are a direct violation of the Establishment Clause. We believe our brief will be of substantial assistance to the Court.

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* The letters of consent have been filed with the Clerk of the Court.

Statutes Involved

Sec. 420, Subdiv. 1, of the New York Real Property Tax Law:

> "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tracted, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

Article 16, Sec. 1 of the New York State Constitution:

> "Exemption from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Question Presented

Whether the exemption from real estate taxation enjoyed by churches in respect to property owned by them and used exclusively for religious purposes violates the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth.

Summary of Argument

Whatever questions may arise in respect to governmental aid in form of financing in respect to church operations which are partly religious and partly secular, such as the maintenance of hospitals, there is no doubt that governmental subsidy of a church in respect to its purely religious activities violates the Establishment Clause of the First Amendment. It has long been recognized, not merely after *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), that tax exemption is constitutionally equivalent to subsidy and hence at least *prima facie* forbidden by the Establishment Clause. Various justifications for the practice have been offered, but even a moderately close examination reveals that each of these attempted justifications is constitutionally untenable. What remains is the conclusion that justification for such exemption rests on the fact that the practice is widespread and of long standing. The decisions of this Court, however, establish decisively that neither long-standing nor widespread usage makes constitutional a practice which violates a specific provision of the Constitution. Measured by this standard, the Court should declare tax exemption of realty used exclusively for religious purposes to be violative of the Establishment Clause of the First Amendment.

ARGUMENT

Tax exemption granted to churches in respect to realty used exclusively for religious purposes violates the Establishment Clause of the First Amendment made applicable to the States by the Fourteenth.

A. *The Case Against Constitutionality.*

1. Generally

Ever since February 28, 1811, when the author of the First Amendment in his capacity as President of the United States vetoed a bill reserving certain land in Mississippi territory for a Baptist church on the ground that it would violate the Establishment Clause of the Amendment,[1] it has been clear and practically uncontroverted that the government may not make a grant of property or money to a church to be used for support of its religious operations. In words that have almost become a classic gloss on the First Amendment this Court has said on at least four occasions:[2]

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[1] In his veto message Madison stated that he acted "because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 1 Richardson, *Messages and Papers of the Presidents* 489-490 (1896-1899).

[2] *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 492-493 (1962). See also, *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Engel* v. *Vitale*, 370 U.S. 421, 436 (1962); *School District* v. *Schempp*, 375 U.S. 203 (1963).

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Uncertainty and disagreement have concededly accompanied application of the principles set forth in this paragraph, specifically where the religious institution receiving governmental aid may be said to be performing a secular as well as a religious function. This difficult question arose even before the above paragraph was first set forth in the *Everson* case in 1947. Thus, in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), the Court upheld governmental financing of a hospital operated by a religious order on the ground that the healing of the sick is a secular function. In the *Everson* case itself the Court was sharply divided as to

whether governmental financing of transportation to parochial schools served essentially a secular or a religious purpose, the majority deciding in favor of the first alternative.

In *McGowan* v. *Maryland, supra,* the Court was less divided on application of the principle of barring governmental aid to religion. With but one Justice dissenting, it held that while compulsory Sunday observance laws were undoubtedly religious in their origin, the passage of time and change of circumstances had fundamentally altered their character, converting them to secular laws whose purpose is to assure a uniform day of rest and relaxation. The concluding words of the Chief Justice's opinion for the Court show clearly, however, that a law whose purpose it is to aid religion violates the First Amendment. (366 U.S. at 453).

In *Board of Education* v. *Allen,* 392 U.S. 236 (1968) the Court was again divided on the application of the principle, a majority holding that governmental financing of the purchase of secular textbooks for use in parochial schools serves a secular rather than a religious end, just as financing of transportation to such schools. But neither *Allen* nor *Bradfield, Everson* or *McGowan* challenge the validity of the basic principle announced in *Everson,* that government may not finance the purely sectarian operations of a religious institution.[3] Where the contested governmental

[3] It should be noted that in the quoted *Everson-McCollum-McGowan-Torcaso* paragraph the critical words forbid government to "support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach or practice religion.*" A reasonable argument can be made that healing the sick (*Bradfield*), providing for the safety of children on their

activity clearly served only a religious purpose (as in *McCollum, Torcaso, Engel* and *Schempp*) the Court had little difficulty in finding it to be unconstitutional.[4] In *Allen*, the Court stressed that the textbooks supplied to the children in parochial schools were entirely secular and went out of its way to quote from the *Everson-McCollum-McGowan-Torcaso* paragraph "that the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another," and bars too "any amount, large or small * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'" (392 U.S. at 242).

On the same day that the Court announced its decision in *Allen* it handed down its decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968). In that case the Court termed it "palpably unconstitutional conduct" for government to provide funds for the construction of churches. (392 U.S. at 98, footnote 17.) It noted that "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." (392 U.S. at 103.)

In the light of these and innumerable other authorities that might be cited it may be reasonably said that if any-

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way to school (*Everson*), securing to people one day rest in seven (*McGowan*) or providing their children with secular textbooks (*Allen*) do not constitute the teaching or practice of religion.

[4] In *Torcaso* there was no dissent. In each of the others only one Justice dissented.

thing is settled in constitutional law it is that government may not finance the purely religious operations of religious institutions. That, we suggest, is the only issue in the present case. We are not faced here with uncertainties regarding the financing of operations which serve dual ends, religious and secular. The appellant challenges the constitutionality of the New York statute only insofar as it "grants exemptions from real property taxation to religious organizations on real property *used exclusively for religious purposes.*" (Jurisdictional Statement, p. 3. Emphasis added.) This suit in no way challenges the constitutionality of tax exemption granted to religious institutions in respect to property used for hospitals, children's and old age homes. It is limited to exemption on property used exclusively for religious purposes, no matter how narrow a definition may be accorded to the word "religious."

With the issue so defined, it is difficult to see how tax exemption for religiously used property can be reconciled with the principles set forth in *Everson* and reiterated in all the church-state cases following *Everson.* As we will indicate below, there is widespread agreement if not practical unanimity among legal authorities that if this Court meant what it said in *Everson* and its successors, such exemption cannot stand. But the principles announced in *Everson* were not there created; they go back, as all the Justices in that case agreed, to the very foundation of the Republic and to the adoption of the First Amendment. Religious tax exemption was therefore not made unconstitutional by *Everson,* but if unconstitutional was so from the beginning.

One can hardly escape from this conclusion. "Taxes," said Mr. Justice Holmes, "are what we pay for civilized society," [5] and all persons and institutions that enjoy the benefits of civilized society are at least prima facie legally obligated to pay taxes. The relationship between taxation and the enjoyment of the benefits provided by government is particularly clear in the case of real property. It is the taxes on real property which the government uses to purchase the police, fire, sanitation, safety and other services which the property receives from the government. There is no legal distinction between the government's granting these services gratis and its granting the owner money to buy these services from a private source. If the latter is unconstitutional,[6] so too is the former.

2. Pre-*Everson* authorities

The view described above was recognized long before *Everson*. Certainly, if any one person could be pointed to as the single most authoritative source for the meaning of the First Amendment it would have to be Madison, whom this Court has only recently termed its "leading architect." [7] Madison had no doubt that tax exemption of churches at least in respect to property used exclusively for religious

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[5] *Compania General* v. *Collector*, 275 U.S. 87, 100 (1927) (dissent).

[6] "If a state were to make outright grants to churches out of tax funds in amounts equal to the taxes that would be levied for exemptions, this would clearly violate the First Amendment as construed in Everson." Kauper, "The Constitutionality of Tax Exemptions for Religious Activities," in Oakes, *The Wall Between Church and State* 105 (1963). "Income from discharge of indebtedness" is included in the definition of "gross income" in the Internal Revenue Code, 26 U.S.C. Sec. 61.

[7] *Flast* v. *Cohen*, 392 U.S. at 102.

purposes was inconsistent with the Establishment Clause. In his "Detached Memoranda," discovered and published in 1946, Madison wrote:

> Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history. (See the cases in which negatives were put by J. M. on two bills passed by Congs and his signature withheld from another. *See also attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes.*)[8]

Immediately after this paragraph, Madison wrote:

> The most notable attempt was that in Virga to establish a Genl assessment for the support of all Xn sects.

Madison then continues with an account of the struggle in Virginia which it is now generally recognized led to and was part of the legislative history of the First Amendment.

The proximity of these two quotations from the Detached Memoranda is, we suggest, of great significance. It shows quite clearly that Madison could find no difference between a law imposing a tax for religious purposes and one exempting houses of worship from taxes.

Others too had similar grave doubts. The Supreme Court of Indiana stated:

> It is easier to admire the motives for such exemption than to justify it by any sound argument. • • •

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[8] Fleet, Madison's "Detached Memoranda", 3 *William and Mary Quarterly* 534, 555 (1946). (Emphasis added.)

> Only let the theory be carried a little further; let a specific tax be levied to support houses of worship, and it will speedily attract public attention. Yet the one is precisely the same in principle as the other. * * * To say that such is the practice of civilized nations, is not sound. It is rather an apology for a departure from principle. *Orr* v. *Baker,* 4 Ind. 86 (1858).

In 1930, seventeen years before *Everson,* an authority on tax exemption wrote:

> The founders of our government have usually been credited with having exercised a remarkable amount of foresight and judgment. Among other things they provided for the separation of church and state. Suppose some ambitious legislator, anxious to assist the church and to increase the salaries of underpaid clergymen were to sponsor a bill to pay each church from state funds, one-half the pastor's salary. Immediately he would be met with the objection that this were an involvement of church and state, the church would become involved in entangling political alliances, and that the only way to maintain an independent church policy is to keep it free from political influence.
>
> In fact, however, the state does contribute to the support of the church through the grant of tax exemption. A church and site in a city are worth $250,000, and if this were assessed and taxed on the same basis as other real estate, it would pay a tax, say, of $5,000 a year. But since exemption from the payment of this sum has been granted, the state has, in effect, subsidized the church. Hunter, Tax Exemption—A Subsidy, 8 National Tax Magazine 332 (1930).

Three years later, Zollman, an authority generally favorable to state aid to religion, pointed out in his authoritative text *American Church Law,* that

> This exemption is not so easily justified on principle as it is supported by authority. * * * While charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited by the Federal Constitution and impliedly by all but one of the State Constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption. (P. 327.)

The following year, another authority on taxation wrote:

> Since the fundamental laws that have been accepted in the United States provide for the separation of Church and State, and since the exemption of church property from taxation constitutes a subsidy to the church associations, it is clear that what has been expressly prohibited is being indirectly carried on and that the courts and a large part of the public are sanctioning it. Stimson, The Exemption from Taxation in the United States, 18 Minn. L. Rev. 411, 422 (1934).

3. Post-*Everson*

These, and other authorities which might be cited,* indicate quite conclusively that long before *Everson* there was widespread and authoritative opinion that tax exemptior

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* E.g., Adler, "Historical Origin of the Exemption of Charitable Institutions," Westchester County Chamber of Commerce, "Tax Exemption on Real Estate," p. 76 (1922); *Franklin Street Society* v. *Manchester,* 60 N.H. 342, 349 (1880).

for houses of worship could not easily be reconciled with the American principle of church-state separation. The exposition and definition of this principle in *Everson* and its successors simply emphasized what had been recognized earlier. This has widely been acknowledged by authorities who have examined these decisions.[10] Their views have been summarized by one writer as follows:

> Objective consideration of the opinions in the Everson and McCollum cases leads to the conclusion that tax exemption for churches violates the First Amendment as interpreted by these decisions. • • • This conclusion can hardly be avoided if the language of those is to be given its fair meaning. Under these decisions government aid to religion, even if not preferential or discriminatory is barred by the Constitution, and few would deny that exemption of church property constitutes governmental aid. • • • [11]

Even those authorities who favor tax exemption for churches find it difficult if not impossible to reconcile it

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[10] Pfeffer, *Church, State and Freedom*, 217-218 (Rev. ed., 1967); Paulsen, "Preferment of Religious Institutions in Tax and Labor Legislation, 14 *Law and Contemporary Problems* 144 (1949); Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio L. J.* 461 (1959) Note, "Constitutionality of Tax Benefits Accorded to Religion," 49 *Col. L. Rev.* 968 (1949); Hurvich, "Religion and the Taxing Power," *Univ. of Cin. L. Rev.* 531 (1966); Comment, "Constitutionality of Tax Exemption Accorded American Church Property," 30 *Alb. L. Rev.* 58, 68-69 (1966); Note, 3 *Rutgers L. Rev.* 115 (1949); Note, "Taxation of Religious Organizations," 5 *Vill. L. Rev.* 255 (1960); Comment, "State Tax Exemption and the Establishment Clause," 9 *Stan. L. Rev.* 366 (1957).

[11] Pfeffer, *Church, State and Freedom*, 217-218. According to John C. Bennett, president of Union Theological Seminary, tax exemption is "the most remarkable of all forms of aid to religious bodies." Bennett, *Christians and the State*, 232 (1958).

with what was said in *Everson* and *McCollum*.[12] Generally, they seek to accomplish this by asserting that "the no-aid principle cannot be taken literally,"[13] or to put it less euphemistically, that the Court did not mean what it said in *Everson-McCollum*. We prefer to believe that the Court meant what it said in these cases. Certainly it has had ample opportunity to repudiate them. Not only has it not done so but in practically every case since *Everson* it has reiterated the classic paragraph either in whole or in the critical part.[14]

But even if we were to disregard the no-aid test and apply the test announced in *Schempp* and followed in *Allen*, the case for the constitutionality of tax exemption for churches is no stronger, if it is not in fact weaker. In *Schempp* the Court set forth the following test for determining constitutionality under the Establishment Clause:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a

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[12] Kauper, *op. cit.*, p. 115; Drinan, *Religion, the Courts and Public Policy* 8 (1963).

[13] Kauper, *op. cit.*, p. 115. Both Kauper and Drinan seek to support this conclusion by noting that the Court had dismissed for want of a substantial federal question the appeal in *General Finance Corp.* v. *Archette*, 369 U.S. 423 (1962), wherein the state court had upheld constitutionality. Whatever probative value that fact might have had is vitiated by the Court's noting probable jurisdiction in the present case.

[14] See cases cited: footnote 2 *supra*.

> primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

This can hardly be interpreted as a repudiation of *Everson*, but lest there be any doubt on that score let it be noted that the Court *cited Everson as its authority* for this test, and in its opinion (at p. 220) quoted the critical "no-aid" sentence from *Everson*. Nevertheless, we will examine the *Schempp* test without regard to its source and independently of any of the church-state cases that preceded it.

In *Schempp* the Court applied this test to declare unconstitutional devotional Bible reading and prayer recitation in the public schools. The Court rejected a contention that the purpose of the practice was the secular one of promoting moral values. It held that its purpose and primary effect was the advancement of religion.

In *Allen* the Court upheld the constitutionality of a statute providing for the free use by parochial school children of *secular* textbooks purchased with public funds. The Court stated that in the absence of evidence to support it, it could not accept the plaintiff's claim that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Applying the *Schempp* test to the present case we cannot see how tax exemption for realty used *exclusively* for religious purposes can stand. What can be the purpose of such an exemption except the advancement of religion? What can be its primary effect except the advancement of religion? We are, we repeat, not faced here with any

question of dual purpose, with activities which are partly religious but also partly secular. There is therefore no occasion, as there was in both *Schempp* and *Allen,* to weigh one against the other to determine which is primary and which is secondary. If, we submit, tax exemption for property used exclusively for religious purposes does not advance religion, then neither does a direct subsidy, and nothing remains of the Establishment Clause.

B. *Attempted Constitutional Justification.*

Father Robert Drinan, an ardent supporter of tax exemption for churches, has been frank enough to admit that "No entirely satisfactory rationale for tax exemption has ever been stated in any American judicial decision."[15] In this part of our brief, we propose to examine into the validity of some of the more frequently asserted constitutional justifications for exemption of church property from taxation. The conclusion at which we arrive is that the reason that no "entirely satisfactory rationale" for the practice has been stated in any American judicial decision or indeed elsewhere is simply that none exists.

1. Aid to religion is constitutional if it is non-preferential

In *McGowan,* the Court recognized that the origin of Sunday laws was religious and their objective religious. Even after the adoption of the national and state constitutions, all of which by 1833 contemplated a separation of church and state, some less sophisticated courts found it

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[15] Op. cit. p. 9.

quite proper for the state to aid and protect the Christian religion by enactment of Sunday laws.[16]

The same rationale for tax exemption for churches is to be found in early cases. Thus, one court stated:

> It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes • • • To deny that church purposes are public purposes is to argue that the maintenance, support, and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and to extend their protection to all in that faith and mode of worship they may choose to adopt.[17]

Obviously, in the twentieth century this rationale cannot be accepted. (In *McGowan*, the Court was able to dispose of it by holding that the present purpose and effect of Sunday laws is no longer to aid Christianity but to protect the general welfare, but this is patently not available in respect to a law which exempts property used exclusively for religious purposes.) Hence, the rationale was broadened, and it was contended that while aid to Christianity

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[16] Thus, a New York court found it proper "that the Christian religion and its ordinances [are entitled] to respect and protection as the acknowledged religion of the people • • •. It would be strange that a people, Christian in doctrine and worship • • • should in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which is as dear to them as life. • • • Religious tolerance is entirely consistent with a recognized religion." *Lindenmuller* v. *People*, 33 Barb. (N.Y.) 548 (1861).

[17] *City of Hannibal* v. *Draper*, 15 Mo. 634 (1852).

alone might be unconstitutional, aid to all religions non-preferentially is not.[18]

This contention was presented in the oral argument by counsel for the appellee in the *McCollum* case in the following colloquy:

> Mr. Justice Black: Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?
>
> Mr. Franklin: Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.
>
> Mr. Justice Black: How does it do it?
>
> Mr. Franklin: By tax exemption specifically granted to religious organizations.[19]

In *McCollum*, the Court rejected the no-preference theory as it did consistently in all later church-state cases until it could say in *Schempp* that "[s]uch contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises."

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[18] O'Neill, *Religion and Education Under the Constitution* (1949); Brady, *Confusion Twice Confounded* (1955); Parsons, *The First Freedom* (1948); Corwin, "The Supreme Court as National School Board," 14 *Law and Contemporary Problems* 3 (1949); Murray, "Law or Prepossession?", in McCloskey, *Essays in Constitutional Law* 316 (1957).

[19] Quoted in O'Neill, *op. cit.*, p. 225. Though the total financial benefit granted to religious institutions through tax exemption is not easily calculable, a rough estimate can be derived from the fact that the value of *new* construction of religious buildings in 1966 alone is said to be $1,174,000,000. Year Book of American Churches for 1968 (National Council of Churches) 215.

(374 U.S. at 217.) Hence, tax exemption for churches can no longer be justified on the ground that non-preferential aid to all religions does not violate the Establishment Clause.

Yet, Mr. Franklin's assertion that through tax exemption "the State of Illinois does contribute five million dollars annually to religious faiths" seems unanswerable. It follows from this that if the practice of tax exemption for churches does not support the contention that non-preferential aid to religion is constitutional it can only be because the practice itself is unconstitutional.

2. Exemption is an indirect aid

The argument has been made that while a direct subsidy to a church is unconstitutional, exemption from taxation is an indirect benefit and hence permissible.[20] The position was stated by Professor Kauper as follows:

> • • • The Court has passed upon school released-time plans for religious instruction of children, upon Sunday-closing laws, and recently upon a prayer prescribed for use in public schools. But all these cases, while dealing with the non-establishment clause, were concerned with the affirmative use of state police and tax powers to aid religion or promote religious practices. They are, therefore, not directly applicable to tax exemptions which involve indirect aid.[21]

In support of this argument, it has been suggested that *Everson* (as well as its predecessor, *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930) and its

[20] 3 Stokes, *Church and State in the United States* 423 (1950).

[21] Kauper, *op. cit.* at p. 106.

successors, *McGowan* and *Allen*) supports the constitutionality of indirect aid to religion.[22]

The difficulty with this argument is that it misconceives the meaning of "indirect" and the holding of these cases. To the extent that these decisions support the assertion that indirect aid to religion is constitutional, the term "indirect" means incidental or not primarily purposed. In each of these cases, the purpose of the challenged statute, as determined by this Court, was to further a secular end, such as ensuring the safety of children, providing them with a secular education or ensuring a day of rest for workers. The benefit accruing to religion was simply an incidental by-product of a law seeking to advance a secular endeavor. This is obviously not the case in respect to a statute which is limited to one objective, namely, relieving churches of the obligation to pay for services provided to them by the state.

We can see no way to distinguish constitutionally between a direct subsidy to churches and tax exemption. As we have indicated, the author of the First Amendment found no distinction between them. Nor have any but a few constitutional authorities been able to do so. Such a distinction can be accorded constitutional efficacy, we submit, only by elevating fiction over reality.

3. Churches, like hospitals and orphanages, perform an important public service and like them can be exempted from taxation

This argument has been well stated by one state court:

> Exemptions are granted on the hypothesis that the association or organization is of benefit to society, that

[22] Robertson, *Should Churches Be Taxed?* 217-218 (1968).

it promotes the social and moral welfare, and, to some extent, is bearing the burdens that would otherwise be imposed upon the public to be met by general taxation.[23]

There can be no quarrel with this reasoning insofar as it relates to social welfare operations conducted by churches, as long as they are operated entirely on a nonsectarian basis. The tax exemption of a denominational hospital operated as a secular institution is as unobjectionable as direct financial grants to such institution.[24] The hypothesis has no relevance, however, to exemption of property used exclusively for religious purposes. It is undeniable that if private organizations will not care for orphaned children or the destitute ill, the state will be required to do so; and thus the private organizations are performing a function that the government would be required or at least would be constitutionally empowered to perform. It is therefore as proper for the state to exempt such organizations from taxation as it is to make direct subsidies to them.

Under our system of separation of church and state, however, it is not within the jurisdiction of government to provide worship if private groups fail to do so. To say that churches perform a public function is therefore misleading. And if it is urged, as it frequently has been, that the promotion of morals and ethics by churches is beneficial to the public and is necessary to the advancement of civilization and the welfare of society,[25] it is inconsistent to concede

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[23] *Young Men's Christian Association* v. *Douglas County*, 60 Neb. 642 (1900).

[24] *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

[25] Saxe, *Charitable Exemption from Taxation in New York State* 45-46 (1933); Drinan, *op. cit.*, p. 9. ("It may be that the only

that the same considerations do not justify direct grants to churches.

The argument that devotional Bible reading and prayer recitation can be sponsored by public school authorities because they promote morals and good citizenship was specifically and emphatically rejected by this Court in *Schempp*. It is, we suggest, no more valid to sustain aid to religion in the form of tax exemption than it is to sustain aid in the form of school sponsored prayer.

4. Equal treatment for churches

Professor Kurland has suggested that the Establishment Clause forbids government to impose legal distinctions based upon religion either for benefit or detriment.[26] Hence, a statute exempting nonprofit organizations but which by its terms or judicial interpretation excludes religious nonprofit organizations would be unconstitutional. The Kurland doctrine has not won the approval of any court,[27] but a somewhat similar though less expansive claim has been made in respect to tax exemption for churches. According to this claim, a state is not constitutionally required to include tax exemption for churches in its program of exemption for nonprofit organizations but is not constitutionally forbidden to do so if it wishes. In other words, if a state

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possible ultimate justification is a public policy consciously encouraging religion as a valuable aid to good citizenship."); Antieau, Carroll and Burke, *Religion Under the State Constitutions* 169 (1965) ("Religion has provided this society with the moral guides by which our individual and public conduct is measured.")

[26] Kurland, *Religion and the Law: Of Church and State and the Supreme Court* 112 (1962).

[27] See Pfeffer, "Religion Blind Government," 15 Stanf. L. Rev. 389 (1963).

does exempt nonprofit associations from taxation, it may accord equal treatment to churches.[28]

The difficulty with this rationale is that placing all nonprofit organizations under a single umbrella does not relieve any of them of the need to justify its right to be under the umbrella. Nonprofit associations (and even profit-making ones) which serve secular purposes may be constitutionally exempted from taxation because they can be constitutionally subsidized out of public funds. But the First Amendment bars governmental financing of church operations and the bar cannot be evaded by designating the beneficiaries of the governmental financing as nonprofit associations rather than specifically as religious associations.

Can it be doubted that a state law making direct grants of funds to educational institutions cannot be constitutionally applied to include theological seminaries in its operation? In *Allen* (as in its predecessor *Cochran*), the Court emphasized that the textbooks supplied to children in parochial schools were secular textbooks. But if the umbrella theory is valid, why the emphasis? Would not an inclusive law providing public funds for whatever textbooks are used in the schools be equally constitutional?

In many European countries, including some Communist ones,[29] priests enter the public school classrooms to teach

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[28] *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, 216 A. 2d 897, *cert. den.* 385 U.S. 816 (1966); "Congress in granting tax exemption under this statute, like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community." *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, 129 (1957).

[29] Pfeffer, *Church, State and Freedom*, 64-65 (Rev. 1957 ed.).

religion to children whose parents wish it, and are paid by the government just as are other teachers. Under the umbrella theory, this would be constitutional in the United States, but it is more than doubtful that any court in the United States would uphold the validity of such a practice.

The crux of the matter was stated by Mr. Justice Jackson in *Everson* in the following words:

> • • • It [a state] may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition • • • that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom • • • . 330 U.S. at 26 (dissenting opinion).

The basic assumption of the umbrella theory is and must be that there is a fundamental constitutional difference between aid to religion in the form of a direct subsidy of public funds and aid in the form of relieving religious institutions of the obligation to pay in the form of taxes for services it receives from the state. As we have indicated, the author of the First Amendment found no such

difference and neither have most constitutional authorities who have examined the question.

5. Tax exemption is a permissible accommodation to the claims of religious liberty

Another argument in support of tax exemption asserts that while the claim of churches to exemption under the Free Exercise Clause of the First Amendment may be going too far, it is nevertheless within the province of the legislature to balance the competing claims of free exercise and no-establishment and decide in particular cases in favor of the former. There is, according to this theory, a gray area betwen free exercise and no-establishment wherein the Constitution permits legislative discretion.[30]

Conscientious objection to military service is cited as an example. A person whose religious beliefs do not permit participation in armed combat does not, according to this Court, have a constitutional right under the Free Exercise Clause to be exempt from military service.[31] On the other hand, it is within the constitutional power of Congress to grant such exemptions.[32] Similarly, this Court has held that the First Amendment's Free Exercise Clause does not entitle a Sabbatarian to be exempt from a state's compulsory Sunday closing law,[33] but a statutory exemption is not unconstitutional.[34]

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[30] Kauper, *op. cit.*, p. 112.

[31] *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934); *United States* v. *Schwimmer*, 270 U.S. 644 (1929). But see *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), prob. jurisd. noted 38 U.S.L.W. 3127 (Oct. 13, 1969).

[32] *Selective Draft Law Cases*, 245 U.S. 366 (1918).

[33] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961).

[34] *Commonwealth* v. *Arlan's Department Store*, 357 S.W. 2d 708 (Ky. 1961), appeal dismissed for want of a substantial federal question, 371 U.S. 218 (1962).

By the same reasoning, it is argued, a church does not have a constitutional right to be exempt from taxation but the legislature does have the constitutional power to grant such exemption in the interests of religious liberty.

This argument mistakes the rationale of the cases upon which it relies. In each of them, the action of the legislature in commanding military service or abstention from business on Sunday does in fact impair the free exercise of religion. The impairment has been held constitutional because the free exercise of religion must on occasion yield to what is deemed paramount societal interests, such as national defense and the general welfare. But where the legislature has determined that the interests of national defense or of general welfare would not be seriously threatened by an exemption based upon a claim of religious obligation, the courts will accept the legislature's judgment.

This reasoning, however, is applicable only where there is a bona fide substantial claim that adherence to the general law would violate religious conscience. It is not applicable where the only "violation" is claimed freedom from taxation. The reasoning would be relevant in the case of one who, like a religiously motivated Thoreau, believed that payment of taxes to government violated God's command. There is no such claim in the present case; nor is the challenged statute limited to those who, like the conscientious objector in the *Selective Draft Law Cases* or the Sabbatarian in the *Arlan's Department Store* case, assert bona fidedly that compliance with the law violates his religious conscience or penalizes him for following his religious conscience. These cases, therefore, are irrelevant to the issues before this Court in the present case.

6. Tax exemption is required by the Free Exercise Clause

By far the most expansive justification for tax exemption is the claim that it is required by the Free Exercise Clause and that any effort by a legislature to impose a tax upon church property used exclusively for religious purposes would be unconstitutional. This claim was asserted by intervening religious groups in *Murray* v. *Comptroller, supra,* but the Maryland Court of Appeals found it unnecessary to pass upon it, holding instead that exemption was at least legislatively permissible.

The claim reappears in this appeal in the brief *amicus curiae* of the National Council of the Churches of Christ in the United States of America. It is not claimed that it would violate the conscience of the churches to pay a tax to the secular government; it would be difficult for such a claim to be made by a church whose Founder, in response to a question whether it was lawful to pay taxes to the government, said "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matth. 22:21). Rather, the claim is that to tax property used for religious purposes is in effect a tax upon the exercise of religion which was declared unconstitutional in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). A house of worship, it is asserted, is "so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of religion and have the same effect as that tax upon the itinerant evangelist which the Court found unconstitutional in Murdock." [35]

The brief of the National Council of Churches in the present case similarly relies almost exclusively on *Murdock*

[35] Brief of Temple Emanuel in *Murray* v. *Comptroller,* quoted in Robertson, *op. cit.,* at 223.

where the Court invalidated as a violation of the Free Exercise Clause, a provision which required religious colporteurs to pay a license tax as a condition to the pursuit of their activities. The brief (at p. 8-9) quotes the following from *Murdock*:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magano Co.* v. *Hamilton,* 292 U.S. 40, 44-45, and cases cited. Those who can tax the exercise of religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which survived from the Reformation. 319 U.S. at 112.

"The taxation of church edifices used for religious purposes," the brief continues (at p. 9) "would even more obviously be 'a flat tax imposed on the exercise of privilege granted by the Bill of Rights', or, to put it more emphatically, on a right older than the Bill of Rights and guaranteed by it."

Reliance on *Murdock,* we suggest, is misplaced. The Court in that case, apparently anticipating the claim of religious freedom in respect to a tax on the income of a clergyman or on the property of a church, said:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233,

> 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities *or a tax on property used or employed in connection with those activities.* It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. * * * (319 U.S. at 112) (Emphasis added.)

To hold that a tax upon the land and buildings of a church cannot constitutionally be levied by reason of the Free Exercise Clause would lead to impossible results. Freedom of religion is not the only freedom guaranteed by the First Amendment; so too is freedom of speech and the press, freedom of petition and assembly. A state may not consistently with the First Amendment impose a tax on the privilege of publishing a newspaper,[36] but does this mean that a state may not tax the land and plant of the New York Times? Compare *The Associated Press* v. *National Labor Relations Board,* 301 U.S. 103 (1937); *Associated Press* v. *United States,* 326 U.S. 1 (1945). Is a state forbidden to tax (uniformly, of course, with other buildings) an assembly hall? In *Joseph Burstyn Inc.* v. *Wilson,* 343 U.S. 495 (1952), the Court held that motion pictures are a form of communication protected by the First Amendment. Does this mean that a state may not tax movie theatres?

A tax on property used in connection with worship is not a tax on the privilege of worshipping, any more than a tax on a printing plant, assembly hall or movie theatre is a tax on the privilege of printing, assembling or communicating. It is a means whereby the community obtains compensation for the services it renders to the individual

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[36] *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

or association exercising the privilege. The First Amendment does not oblige the community to give something for nothing, even to a church. As Mr. Justice Douglas observed:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money the better to exercise them. *Sherbert* v. *Verner,* 374 U.S. 398, 412 (1963) (concurring opinion).

7. Exemption is long standing and widespread and therefore must be constitutional

By far the most frequent argument in support of tax exemption for church property is that the practice is so widespread and so long standing that it is inconceivable that it could be unconstitutional. "Tax exemption for churches and related institutions," says Father Drinan, "has always existed in American law • • • ."[37] The Court of Appeals in *Murray* v. *Comptroller, supra,* quotes Mr. Justice Holmes[38] that "if a thing has been practiced for two hundred years, it will need a strong case for the Fourteenth Amendment to affect it." The New York Court of Appeals in the present case starts its short *per curiam* opinion by saying that tax exemption for church property is "[f]irmly embedded in the law of this State."

What may be called the historical argument has been expressed perhaps best by Professor Kauper in the following language:

> The first argument in support of the constitutionality of tax exemptions is the very solid consideration that

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[37] Drinan, *op. cit.* at p. 7.

[38] In *Jackman* v. *Rosenbaum* Co., 260 U.S. 22, 31 (1922).

tax exemption for churches are universal in this country and have a long history. This history cannot be explained solely as a carry-over from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigal survival of outmoded practices. The impressive historical argument assumes even greater significance when the attempt is made to use the First Amendment's ambiguous language to outlaw tax exemptions for churches on the theory that the Fourteenth Amendment, adopted in 1868, made it applicable to the states. Whether or not the latter theory rests on more than myth or spurious historical interpretation, it is pertinent to note Justice Holmes's observation that the Fourteenth Amendment was not intended to undo two hundred years of history.[39]

The relationship between tax exemption and church establishment referred to by Professor Kauper has long been recognized. Zollman explains it as follows:

> • • • Church and state in the early days were generally not separated. The church was established. It was a public agency, a municipal corporation like a city, village, or town. A taxation of church property would therefore have been but an idle ceremony. As well might a courthouse or a city hall be taxed. Church property, being public property supported by public taxes was inherently exempt. So long as towns "exer-

[39] *Op. cit.* at p. 110.

> cised parochial functions, and raised taxes for supporting and maintaining houses of public worship, those places were exempt from taxation as public property by the nature of things, and not by the Constitution or by statute." Franklin Street Society v. Manchester, 60 N.H. 342, 349 (1880).[40]

Tax exemption for church property is not the only institution of church establishment dating from colonial times that has reached this Court for testing under the Establishment Clause. The Court has similarly been called upon to pass upon the constitutionality of Sunday laws. Unlike Professor Kauper and many other authorities and courts, the Court has not relied upon either the age (or ubiquity)[41] of Sunday laws to sustain their constitutionality. On the contrary, the Court in *McGowan* rested constitutionality not upon tradition but upon a break with tradition. The Court held that while the origin of Sunday laws was establishmentarian, that chapter in its history had come to an end, and a new chapter based upon secular values had begun. Mr. Chief Justice Warren, in the concluding words made it clear that if the purpose of a contemporary Sunday law were what it was in colonial times the law would be unconstitutional.

But, as we have indicated earlier in this brief there has been no such break in the history of tax exemption for churches in respect at least to property used exclusively for religious purposes. Sunday laws have become secular

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[40] *Zellman, op. cit.* at p. 329.

[41] Sunday laws are almost as ubiquitous as church tax exemption laws. Pfeffer, *Church, State and Freedom*, 273 (Rev. ed., 1967). The laws are listed in the concurring opinion of Mr. Justice Frankfurter in *McGowan*, 366 U.S. at pp. 543-554.

laws; church tax exemption laws have not as they would have, for example, if all churches had become non-sectarian community centers.

In the quoted paragraph Professor Kauper seeks to buttress the argument based upon history by noting that states formed after churches were disestablished also enacted exemption laws. The same argument was presented by the Maryland Court of Appeals in *Murray* v. *Comptroller, supra,* in the following words:

> • • • It is significant, in our opinion, that the act exempting church property in the District of Columbia from taxation • • • was first adopted by the corporation of the City of Washington (Act of Oct. 6, 1802, ch. 51, Washington City Laws. 1802-03) under authority delegated by Congress (Act of May 3, 1802, ch. 53, 2 Stat. 195), approximately eleven years after the adoption of the first ten amendments. Congress thereafter amended the act incorporating the City of Washington but permitted the exemption to remain (Act of Feb. 24, 1804, ch. 14, 2 Stat. 254). It seems a reasonable assumption that members of the Congress in the early years of the nineteenth century were personally familiar with the purposes and scope of the First Amendment, and did not regard exemption as inconsistent therewith.

An argument for constitutionality based on the proximity of date of enactment of the challenged statute to the adoption of the constitutional provision under which it is challenged is a rather weak one. The first decision of the Court declaring unconstitutional a law of Congress[42] was

[42] *Marbury* v. *Madison, 1 Cranch 137* (1803).

one invalidating a statute (the provision in the Judiciary Act of 1789 empowering the Supreme Court to issue writs of mandamus) enacted almost before the ink was dry on the proclamation declaring that the Constitution had been adopted. The Sedition Act of 1798 was enacted only seven years after the First Amendment became part of the Constitution, yet it is highly doubtful that the Court would today uphold its constitutionality.

Either expressly or implicitly, this Court has rejected both the historical and proximity argument in determining constitutionality, as is indicated from the following examples:

(1) *Malapportionment.* Even before the Constitution was adopted, legislative malapportionment existed and was widespread. Madison referred to it in 1786 in his Memorial and Remonstrance Against Religious Assessments.[43] This fact did not deter the Court from declaring in *Baker* v. *Carr,* 369 U.S. 186 (1962) and its numerous successors, that malapportionment is unconstitutional.

(2) *Public school sponsored Bible reading and prayer recitation.* This is a practice which goes back to the very beginning of the public school system.[44] Nevertheless, the Court held the practice to be unconstitutional in *Engel* and *Schempp.*

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[43] " 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people." Appendix to *Everson,* 330 U.S. at 70-71.

[44] Pfeffer, *Church, State and Freedom,* 436 (Rev. ed., 1967).

(3) *Racial segregation in public schools.* Segregated public education was widespread, North and South, when the Fourteenth Amendment was adopted,[45] and remained so long thereafter. Nevertheless, the Court found the practice unconstitutional in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

(4) *Income tax.* For a century after *Hylton* v. *United States,* 3 Dall. 171 (1796), it was universally assumed that a tax on personal property or the income from personal property was not a direct tax and therefore was constitutional. In *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895), the Court held it to be unconstitutional.[46]

(5) *Federal common law.* For a century after *Swift* v. *Tyson,* 16 Pet. 1 (1842), it was universally assumed that Federal courts were not constitutionally bound in diversity cases to follow the state courts' interpretation of the common law. In *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938) the Court held to the contrary.

Other illustrations can be cited, but we believe these are enough to establish that neither age nor ubiquity proves constitutionality. Nor do they relieve this Court of the responsibility for deciding for itself whether tax exemption for church property used exclusively for religious purposes is or is not constitutional. Should the Court do so, we submit, it cannot but come to the conclusion that the practice cannot be reconciled with the Establishment Clause of the First Amendment.

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[45] *See Roberts* v. *City of Boston,* 5 Cush. 198 (1850); *Plessy* v. *Ferguson,* 163 U.S. 537 (1896).

[46] We need hardly note that we do not necessarily agree with the correctness of the Court's decision in that case.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed and the challenged statute be declared unconstitutional.

Respectfully submitted,

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October 1969.